

Wage Compliance Assistance Conference
Hawaii Imin International Conference Center – East West Center
"Overview of Enforcement Policies and Procedures within DLIR"
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Good morning. I am delighted for this opportunity to address this conference.

I want to start off by thanking Professor Conway-Jones, the Hawai'i Procurement Institute and U.S. Department of Labor for their efforts in putting together this very important conference. They have put together an outstanding group of faculty.

It is great to see that so many of you have taken time out from your busy schedules to attend the conference as it reflects your interest on this critical topic. I am sure that you will find this conference informative, productive and worthwhile, as you will learn, among other things, about the Davis-Bacon Act or prevailing wage laws on both federal and state public construction projects.

This conference could not be timelier as the construction industry gears up for the multi-billion dollar federal military housing construction project.

Further, our State economy is in the midst of rebounding from years of economic stagnation. A better economy is likely to mean more public construction jobs.

Background of Chapter 104 – State Prevailing Wage Laws.

Today, I would like to discuss our administration's policies and goals as it relates to the State Prevailing Wage Laws, Chapter 104.

For those of you who are not familiar with Chapter 104, it is the state's version of the federal Davis-Bacon Act, sometimes referred to as the "Little Davis-Bacon." It governs what contractors must pay their employees who are working on public works projects.

The Hawaii State Legislature initially enacted Chapter 104 in 1955 in order to extend the federal Davis-Bacon Act to State and County public works projects. The Wage Standards Division of the State Labor Department administers and enforces the state prevailing wage laws.

The guiding principle of Chapter 104 and the Davis-Bacon Act is to ensure that bids for construction of public works are based on the relative skills

and efficiency of the contractors concerned, and not on a differences in wage rates.

In principle, since the funding of public construction projects is paid from taxes imposed on state residents, projects should not be used to subsidize contractors who are depressing the wages of our working citizens.

The subject of prevailing wages and the enforcement of Chapter 104 are particularly important because of the numerous counties and state public work projects that are being constructed and their impact upon the local economy. Ideally, state and county agencies contracting for services using public money have the obligation to spend taxpayer money wisely and prudently, getting the best services at the best cost.

Goal is to Ensure Local Businesses Have Equal Opportunity to Bid.

We also have an obligation to ensure that our local businesses and workers have an equal opportunity to bid for the work that we are creating in order to ensure that local talent is hired and that taxpayer money is redistributed into the community.

Put simply, Chapter 104 is designed to ensure fairness in the bidding process for taxpayer-funded construction projects. The law requires that all bidders that submit a bid, provide at a minimum, the wages prevailing in the location where the construction work is to be done.

Therefore, if the prevailing wage laws and contract labor standards operate properly, the following results will occur:

- (a) Local contractors will not be underbid by outside contractors using cheap imported labor and sub-prevailing rates as their competitive advantage; and
- (b) Local workers on government projects will receive comparable pay to what they would get on similar jobs in the private sector.

Our administration's goal is ensure that Chapter 104 is consistently applied with the above guiding principles and intent of the law.

Criticism of Current Enforcement of Chapter 104.

However, many have argued that the state's interpretation and enforcement of Chapter 104 has been inconsistent with the original intent of the law. They have claimed, with a certain amount of validity, that the law does not operate properly because of the following THREE factors:

1. First, the State and soliciting agencies have failed to provide outside contractors with adequate and sufficient notice on the wage rates they must pay on the public construction projects in which they are submitting their bids.
2. Second, the State Labor Department has failed to develop a fair and effective inspection and audit program. Generally, inspections and audits are done only when a complaint is filed. To ensure that the Department's resources are used more effectively, it must develop an audit and inspection program that does not rely solely on complaints. In addition, the contracting agencies themselves must provide more oversight to ensure that their contractors are complying with prevailing wage laws.

3. Third, the long-standing policy of our State Labor Department is to fine a contractor for every single violation of the law, regardless of the contractor's good faith in complying with the law or the degree or circumstances surrounding the violation. In other words, if a contractor on a multi-million dollar project is found not to have paid the prevailing wage to several of his employees because a clerical oversight, the contractor will be penalized regardless of whether the contractor acted in good faith by implementing all possible measures to comply with the law. We believe such a policy is outdated and anti-business.

In order to administer Chapter 104 in accordance with the intent of the law, our administration must implement THREE fundamental policies. These policies will ensure that our local contractors will have equal chance to bid on public constructions projects. Let's discuss these three initiatives.

INITIATIVES – SOLUTIONS

Provide Clear and Full Notice of Wage Rates and Relevant Area Practices to All Bidders.

First, we must require that all solicitations be provided to all bidders of public construction projects, clear and full notice of the wage rates, area practices, and compliance obligations BEFORE they bid.

The 2002 Legislature amended Chapter 104's language to require contractors to comply with Chapter 104 even though wage rates or compliance clauses were not included in the contract solicitation and the final contract.

The result has been that a contractor cannot request for a change if the agency fails to place the wage rates in the solicitation and contract, and later demands payment of higher wages than the contractor bid.

This policy creates unintended negative consequences. It creates a financial incentive for agencies to exclude the disclosure of wage rates, thereby enabling them to reap the benefits of a low bid which uses sub-

prevailing wages submitted by a bidder unaware of Chapter 104. This usually happens with an out-of-state contractor.

Although HRS 104-2(f) says the contract is supposed to contain compliance clauses, there is no penalty provision in the law. Therefore, the law does little to encourage contracting agencies to include wage rates in their solicitations.

In essence, we have turned Chapter 104 into a "Gotcha Law" that traps unsuspecting bidders.

As it is presently structured, Chapter 104 does not give full notice to bidders BEFORE they bid. Instead Hawaii Revised Statutes 103-55.5 provides notice of Chapter 104 obligations AFTER they have submitted a legally binding bid at the time of award. As a result, we have the worst of all situations. Let me give you two examples of how our current law may short-change our local contractors:

- In some situations, the winning low bid is likely to be the unsuspecting non-local company who fails to bid at Hawaii

prevailing rates; and the losing bidders are likely to be the knowledgeable local bidders who are aware of Chapter 104 and are paying prevailing rates;

- Second, the low bidder (who failed to bid prevailing rates) will either evade compliance or try to save on higher labor costs by cutting costs in materials and performance on the state construction project;

Unfortunately, the effect of this law means that:

- Local contractors will have unfairly lost a contracting opportunity to the low bidder who was unaware of the state law;
- The state or local contracting agency is likely to get lower quality performance; and
- The workers may get paid less than they are entitled to unless the Department of Labor receives a complaint and conducts an audit.

In order to address this problem and to ensure that full notice is provided to bidders of wage rates and requirements:

- We, the State Labor Department, must publish uniform Chapter 104 clauses in the Department's regulations and include them in the procurement regulations.
- We must adopt rules that will require state and county agencies to provide wage rates and other prevailing wage requirements that are placed in the solicitation. For example, all solicitations must include a statement of general classification rules and all recognized "area practices" unique to Hawaii that may affect the bid price.

Our Department must be able to assist governmental agencies in complying with these laws. We believe implementing these “full-disclosure” policies will foster accountability in our state and local governments and level the playing field for all bidders.

Develop a Comprehensive Audit and Inspection Program.

Our second goal is to establish within the Department of Labor, a strong, effective, and fair enforcement program that does not solely rely on complaints. Under this policy, companies will be subjected to periodic or programmed audits. However, the primary goal of these audits is to first educate and assist contractors to comply with our laws, and afford them the opportunity to remedy any discrepancies or misunderstandings. In the end, the workers will receive the wages they are entitled to under the law.

We must also work in partnership with state and county contracting agencies so that they can audit contracts more frequently and not rely solely on complaints to identify non-compliance.

An audit need not be long and cumbersome. Such a review could include two weeks of payrolls and site checks to ask employees what they were paid for the payroll period they've worked. The idea would be to create a culture of review and enforcement in the agencies and compliance in the contractors.

The bottom line is that we can no longer rely simply on complaints to enforce the prevailing wage requirements of Chapter 104.

Prompt and broad enforcement actions on each contract will correct deficiencies before back wage liability gets so large that the contractor cannot realistically pay and will ensure that those who break the law are identified at the onset.

Implement *De Minimis* Policy – Sanctions Violations According to Severity

Finally, we need to adopt a policy that will allow our Department to issue warning notices rather than citations when contractors inadvertently commit a minor infraction. We believe such a policy is a win-win situation.

First, it benefits the employees as they will be promptly paid for the wages and other benefits they are entitled to under the law.

Second, it benefits employers because they receive a warning notice rather than a citation, which they may choose to defend vigorously, resulting in a costly litigation battle. Finally, it benefits our Department and taxpayers of

our state as it allows our staff to concentrate their efforts on addressing serious violations or on companies who continuously disregard our laws.

This policy should not be mistaken as one that is relaxed on enforcement.

Let me be clear – we will continue to aggressively investigate and prosecute companies who willfully or continuously violate our laws.

CONCLUSION

Finally, in the past, state government often took an adversarial role when it came to enforcing our workforce and labor laws. Our administration's approach is to work as a partner with businesses and assist them in complying with our laws. These are exciting times for our Wage Standards Division.

We are in the process of hiring a new leader for that division, who will be responsible for carrying out these initiatives, taking the division towards a new direction. The Administrator will also be responsible for improving and enhancing our outreach, education, and compliance-assistance program.

Issues concerning wages and Chapter 104 are important as Hawaii's economy continues to grow. Last month Hawaii had the strongest job growth in the nation; we were fourth in the nation in terms of job growth over-the-year, with our economy creating 13,000 new jobs.

Your State Department of Labor is committed to helping Hawaii's businesses capitalize on this exciting economic opportunity. We are doing our best to enable Hawaii's businesses to succeed and contribute to the economic growth of Hawaii.

We must ensure that our residents and local small businesses have an equal opportunity to benefit from and share in this prosperity. It isn't the role of government to subsidize or ensure that local businesses receive government work, but it is our role to ensure that they have an equal playing ground from which to compete for that work.

Thank you for allowing me to share a few words with you. Enjoy the conference.